

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554
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MM Docket No. 95-53

In the Matter of

Amendment of Section 73.202(b).

RM-8613

Table of Allotments.

FM Broadcast Stations.

(Eugene, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 30, 1995;

Released: September 7, 1995

By the Chief, Allocations Branch

1. At the request of Conway Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 4844 (1995), proposing the allotment of Channel 265A to Eugene, Oregon, as the community's fifth local FM service. Petitioner filed comments reiterating its intention to apply for the channel. McCoy Broadcasting Company ("McCoy") also filed comments stating an intention to apply for the channel, if allotted. McKenzie River Broadcasting Co. ("McKenzie"), licensee of Station KMGE(FM), Eugene, and Combined Communications, Inc. ("Combined"), licensee of Station KUGN-AM/FM, Eugene, filed comments in opposition. Petitioner filed reply comments.

2. Both McKenzie and Combined state that Channel 265A cannot be allotted to Eugene in compliance with the Commission's technical requirements because a high promontory rising almost 700 feet between the proposed transmitter site area and Eugene prevents line-of-sight coverage to approximately 50-80% of the community. They point out that Section 73.315(b) of the Commission's Rules states that the transmitter site should be chosen so that line-of-sight coverage can be provided to the community of license and that there should be no major obstruction between the transmitter and the community. According to Combined, it will require an antenna tower of at least 600 meters to achieve satisfactory line-of-sight service. However, it states that the Federal Aviation Administration ("FAA") will not grant approval for such a tall tower at this location because the coordinates proposed in the *Notice* are only 1.6 kilometers (1 mile) from Interstate 5. According to Combined, all interstate freeways are considered by the FAA to be flyways for General Aviation and that the FAA has a policy that limits tower heights to no more than 150 meters where they are located within 3.2 kilometers (2 miles) of an interstate freeway. Further, both McKenzie and Combined state that no other transmitter site area can be used because of the need to protect Stations KZUS-FM, Channel 264C2, Toledo, Oregon, to the west, KUFO-FM, Channel 266C, Portland, Oregon, to the north, KCGR, Channel 263A, Cottage Grove, Oregon, to the south and terrain problems to the east. In view of these difficulties

Combined contends that the Commission cannot allot the requested channel unless the petitioner demonstrates that it can provide all of Eugene with a 70 dBu signal from the proposed transmitter site, citing *Creswell, Oregon*, 3 FCC Rcd 4608 (1988), *recon. denied*, 4 FCC Rcd 7040 (1989).

3. In response, petitioner argues that it is not required to specify a particular transmitter site and demonstrate its compliance with the Commission's rules at the rule making stage. Rather, it states that a petitioner must only show that a theoretical transmitter site area exists, citing *Pinckneyville, Illinois*, 41 R.R. 2d 69 (1977). Further, it contends, citing *Natchitoches, Louisiana*, 52 R.R. 2d 1558, 1561 (1983), that the Commission only requires proof of city-grade coverage in cases "involving site restrictions of approximately 6.5 to 8 miles measured from the city's center." Thus, since the Eugene allotment requires a site restriction of only 4.4 miles from Eugene, it argues that no proof of city-grade coverage is required. In addition, it states that city coverage is determined by reference to Section 73.313 of the Commission's rules "without reference to possible obstructions." Nevertheless, petitioner states that there is a "short-spaced site available less than 1 km from the fully spaced boundary that would provide a high antenna elevation without necessitating construction of a tall tower" and that the site could be utilized by providing contour protection as specified in Section 73.215 of the Commission's rules.

DISCUSSION

4. After carefully considering the pleadings before us, we find that Channel 265A cannot be allotted to Eugene in compliance with the Commission's technical requirements. Generally, a rule making proponent only needs to show that a theoretical site exists which complies with the Commission's minimum distance separation and other technical requirements. However, where, as here, a showing has been made that a terrain obstruction exists which would prevent compliance with the Commission's technical requirements concerning city-grade and line-of-sight service, the Commission requires the proponent to provide an engineering study showing that the allotment can indeed be made in conformance with the technical rules. See *Creswell, Oregon, supra*. This the petitioner has failed to do.

5. Petitioner misconstrues the decisions in *Natchitoches, Louisiana*, and *Pinckneyville, Illinois, supra*. In *Natchitoches*, the Commission requested in the *Notice of Proposed Rule Making* that the petitioner provide a showing demonstrating that the proposed channel could provide the community with the required 70 dBu city-grade signal because the allotment required a site restriction close to the limit where such coverage could be assumed. Because a different channel was ultimately proposed by the Commission and then allotted, with a much less severe site restriction, no specific showing of city-grade coverage was included in the record. On review, the opponent of the allotment requested the deletion of the channel based on the lack of engineering showings. However, the opponent did not provide any evidence demonstrating a need for such a showing. Thus, in response, the Commission stated that:

For small communities, the type usually requesting Class A assignments, the distance from the center of the community to its city limit is usually around one to two miles. Therefore, the Bureau requests proof of

city coverage only in cases involving site restrictions of approximately 6.5 to 8 miles measured from the city's center.

52 R.R. 2d 1561. In *Pinckneyville*, the Commission deleted a previously allotted channel because, at the application stage, it was found that no transmitter site was available which would comply with both the Commission's mileage separation and city coverage requirements. In so doing, the Commission stated:

Ordinarily, there is no need to specify a particular site, it is only necessary to show that a suitable site area exists. However, in some cases, clarification may be necessary and an additional showing may be required before we can make the assignment. This was true here because of a concern about being able to find a site that met the spacing requirements and which would provide the requisite city coverage. In the usual case or even one where additional assurance was required, it sometimes happens that a site thought to be available turns out not to be. As a result, the applicant for use of the channel may be forced to specify another site, even one not meeting spacing requirements. This does not cast doubt on the underlying assignment if there had been a reasonable basis for believing a site was available. However, if this were not the case, the assignment rested on a false premise and should be deleted. ... Such reasonable availability is the premise on which any assignment must result, and without it we must conclude that this assignment was erroneously made. In fact, not only is it now clear that there were questions existing at the time, but it is also clear that the Commission was not given the information necessary to make a decision. Had it been, the assignment would not have been made.

41 RR 2d 71-72. Thus, these decisions do not deny the Commission's right, and, in fact, elucidate the obligation, to require further technical showings for allotments where but evidence of signal coverage problems are provided, regardless of whether a site restriction is needed or not.

6. Regardless, a terrain profile analysis performed by the staff confirms that unobstructed line-of-sight 70 dBu service is not possible without an antenna height of at least 225 meters. It appears that petitioner concedes that there is no transmitter site available which complies with the Commission's technical requirements since it does not refute the opponents showings but instead proposes the use of a transmitter site which does not comply with the minimum distance separation requirements. We cannot find that the allotment of a fifth local FM transmission service to Eugene is a sufficiently compelling public interest benefit to justify a substandard allotment. *See Chester and Wedgefield, South Carolina, recon. denied*, 4 FCC Rcd 4503 (1989), *rev. denied*, 5 FCC Rcd 5572 (1990), *aff'd.*, Case No. 90-1496, D.C. Cir. (1991) (June 6, 1991).

7. Accordingly, IT IS ORDERED. That the petition of Conway Broadcasting (RM-8613) to allot Channel 265A to Eugene, Oregon, IS DENIED.

8. IT IS FURTHER ORDERED. That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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